SUPREME COURT NO. _____
COURT OF APPEALS NO. 242536-III



IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY SCOTT FISHER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Vic L. VanderSchoor, Judge

# PETITION FOR REVIEW

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RULES, STATUTES AND OTHERS

## A. IDENTITY OF PETITIONER

Timothy Scott Fisher, appellant below, asks this Court to accept review of the decision designated in Part B of this motion.

## B. DECISION

Petitioner seeks review of the decision of the Court of Appeals, Division III, filed in his case on November 30, 2006, and of the Order Denying Reconsideration, filed on January 11, 2007.

A copy of the decision is in the Appendix to this Motion at A-1 through A-35. A copy of the Order Denying Reconsideration is in the Appendix at A-36.

## C. ISSUES PRESENTED FOR REVIEW

1. Is a defendant denied his state and federal constitutional rights to proof beyond a reasonable doubt of every element of the crime charged and to jury unanimity where one "to convict" instruction for all four counts required the jury to agree only that sexual contact occurred on four separate days during the charging period, and the "multiple counts" instruction permitted the jury "to convict" if they agreed that at least one particular act--rather than four particular acts--had be proven?

2. Does a trial court abuse its discretion in admitting ER 404(b) evidence to the extent that it is a majority of the evidence at trial and goes far beyond its stated non-character purpose?

3. Must the proponent of prior bad acts evidence seek admission of it outside the presence of the jury?

4. Does a prosecutor's misconduct by arguing successfully that the ER 404(b) evidence was admissible to explain a delay in reporting, and

then using the evidence to argue propensity; by impugning the integrity of defense counsel and seeking to elicit work product; by eliciting sentencing consequences of conviction; by making faces and gestures while the defendant is testifying and during the argument of defense counsel and by making other improper arguments to the jury in closing deny a defendant his state and federal constitutional rights to a fair trial?

5. Does a trial court deny a defendant his state and federal constitutional rights to confrontation of witnesses and to appear and defend at trial by denying him the right to cross-examine witnesses to establish their motive and bias and to present witnesses to support his theory of defense?

## D. STATEMENT OF THE CASE

The four counts of second degree child molestation charged against Timothy Fisher arose from allegations by 19-year-old Melanie Lincoln that Mr. Fisher had touched her inappropriately seven years earlier. CP 126-28. 139-40.

### 1. Relevant evidence

Mr. Fisher married Ms. Lincoln's mother, Judy Ward, when Ms. Lincoln was in the fifth grade. RP 38. According to Ms. Lincoln, when she was in the seventh grade, Mr. Fisher started taking her upstairs, almost daily, to the room she shared with her younger sister Brittany and having her take off her pants and lift her shirt while lying on the bed. RP 61-62, 65, 68-69. She testified that while she lay quietly, Mr. Fisher would open and close the outer portion of her vagina and sometimes pluck her pubic

hair or twist her breasts. RP 61-62, 65, 68-69. Mr. Fisher did not remove his clothing or fondle himself during these times. RP 150.

Ms. Lincoln's brother, Brett, who was 17 at the time of trial, testified that he once heard a scream from the room. While at a pretrial hearing, he had adamantly insisted he heard screaming and spanking every day from his parents' room --"like someone down the street was chasing someone and they were screaming for their life." RP(1/8/04) 156, 165-67; RP 627-29. When questioned about the inconsistency at trial, Brett denied that he ever made the pretrial statements and their truth.

Brittany and Mr. Fisher's two children from an earlier marriage all testified that they never saw Mr. Fisher and Ms. Lincoln go upstairs together. RP 275-402. The children's babysitter during the summers recalled that the children never acted afraid of Mr. Fisher and that their demeanor did not change when he arrived. RP 362-64.

Mr. Fisher denied any sexual misconduct with Ms. Lincoln at the time of his arrest and in his trial testimony. RP 438, 522, 524, 540-41.

Ms. Lincoln testified that she did not tell anyone about what happened because Mr. Fisher threatened to harm her if she did. RP 54.

**2. ER 404(b) evidence**

The majority of the testimony and argument at trial was devoted to evidence about Mr. Fisher's alleged acts of physical abuse of Ms. Lincoln, Brett, Brittany, and Mr. Fisher's two children. The trial court accepted the prosecutor's argument that the prior bad acts of physical abuse against Ms. Lincoln and her siblings explained Ms. Lincoln's delay in reporting the allegations. RP 2-3. The state, however, was also permitted to introduce

evidence that the stepmother of Mr. Fisher's two children had filed a complaint alleging that they had been physically abused. RP 617-22.

The prior bad acts evidence included a time in 1999 when Mr. Fisher was no longer living with the family and a police officer came to the house. RP 71-72. Ms. Lincoln talked to the officer about physical abuse, but did not report any sexual abuse. RP 71-72.

The prosecutor used the prior bad acts evidence, not to argue that it explained the delay in reporting, but to argue that Mr. Fisher was guilty because of his "distinctive pattern" of abuse, and that to acquit him the jurors would have to disbelieve all of the testimony of the witnesses who described the physical abuse. RP 661, 709. The prosecutor listed 13 instances of abuse on a board for the jurors and argued that this conduct "spilled over" into sexual abuse. RP 711-712. He argued that Mr. Fisher abused his children, and asked "What's that consistent with?" RP 661. The prosecutor told the jurors that they had to "balance" the testimony of Ms. Lincoln against the defendant's and that the balance tipped towards her telling the truth. RP 655.

**3. Exclusion of defense evidence**

The trial court excluded evidence, during opening statement and trial, that issues arising in their divorce might have given Ms. Ward a motive and bias in prosecuting and testifying against Mr. Fisher. RP 23-26. The defense made an offer of proof that the divorce was bitter and drawn out; Ms. Ward had told a friend and colleague that she would "get" Mr. Fisher. RP 23-24. Mr. Fisher had won a judgment requiring that the house be sold and the equity divided. RP 297. Ms. Ward had refused to

sell the house and, after delays and contempt proceedings, was permitted to pay a money judgment. RP 297. It took three years, however, for Mr. Fisher to collect the judgment and, during that time, Ms. Ward tried to file bankruptcy to avoid paying. RP 297-98.

Defense counsel was permitted only to ask Ms. Ward on cross-examination if she had told the officer who came to the house in 1999 that she was in the middle of a long, bitter divorce. RP 313. The prosecutor was permitted, nevertheless, to ask Ms. Lincoln to confirm that Mr. Fisher did not owe her money or property, that she had never owed him anything, and that she had not filed a civil lawsuit against him. RP 98. She was permitted to testify that neither Brett nor Brittany had anything to gain from their testimony. RP 99.

**4. Impugning the defense and work product**

The prosecutor was permitted to call the defense investigator as a witness and question her about how the defense investigation was conducted and how many hours she spent on the case. RP 180. The prosecutor asked who had been interviewed, who conducted the interviews, whether defense counsel asked Ms. Lincoln about sexual abuse, and whether such questions should have been asked. RP 206-07. The prosecutor was permitted to question Mr. Fisher about whether his attorney and the defense investigator told him how to testify and accused him, in front of the jury, of having rehearsed his testimony. RP 584-85. When defense counsel objected, the prosecutor responded that Mr. Fisher was giving pat answers and "we need to get to the bottom of why." RP 587. Even though the court sustained an

objection to the question, the prosecutor continued, "You've been well coached." RP 588.

The prosecutor asked Mr. Fisher what was the common denominator in all of the accusations and defense counsel objected under ER 404(b). After a sidebar, the court said this could be argued in closing and allowed the prosecutor to ask Mr. Fisher if he was the person accused in each instance. RP 609. The prosecutor was also permitted to ask Mr. Fisher if he was aware of having to register as a sex offender if convicted and that he would not be able to have contact with children. RP 611.

**5. The prosecutor's eye rolling and gestures**

In its motion for new trial, the defense noted the prosecutor's gestures and expressions in front of the jury. RP (12/21/04) 2-6; CP 56-72, CP 82-103. In support of the motion, the defense submitted affidavits attesting to the fact that the prosecutor winced, rolled his eyes, and shook his head in a negative manner while Mr. Fisher was testifying and during closing argument. CP 77-81. The defense investigator had personally observed expressions and gestures when Ms. Lincoln was testifying and during defense counsel's argument. RP(12/21/04) 2-6. The court acknowledged that there were words and gestures by the prosecutor which "were not entirely appropriate" and "some gestures and so on," "but not that would undermine the jury's impartiality." RP (12/21/04) 57-58.

**6. Jury Instructions**

Instead of giving a "to convict" instruction for each count, only one instruction was given; it told the jurors that to convict, they had to agree

that "on four separate days between January 1, 1997 and December 30, 1997, the defendant had sexual contact with Melanie Lincoln."

The state did not elect which count or which days it was relying on for each count. Instead the court instructed the jury:

> There are allegations that the defendant committed acts of child molestation on multiple occasions. To convict the defendant, one or more particular acts must be proven beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proven beyond a reasonable doubt. You need not unanimously agree that all the acts have been proven beyond a reasonable doubt.

CP 116. The jurors were never instructed that each count was a separate crime and that the verdict on one count should not control the verdict of other counts. The jury was confused. During deliberations, the jurors sent out a note asking "Why are there 4 counts? Why not 3 or 6? What was the basis for 4 counts?" CP 108. The court responded, "You must rely on the instructions already given to you by this Court." CP 108.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### 1. THE INSTRUCTIONAL ERRORS WERE CONSTITUTIONAL AND THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH OTHER REPORTED DECISIONS BY THE UNITED STATES SUPREME COURT, THIS COURT, AND THE COURT OF APPEALS. THE ISSUE IS ONE OF SUBSTANTIAL PUBLIC IMPORTANCE.

The one "to convict" instruction given allowed the jury to convict Mr. Fisher of four counts if it agreed that Mr. Fisher had sexual contact on any four days during the charging period. CP 118.

Thus, the "to convict" instruction was insufficient under In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979),

and State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980), which require the state to bear the burden of proof on every element of the charged crime.

The "to convict" instruction failed to require jury unanimity and thus denied Mr. Fisher his state and federal constitutional right to have the jury determine unanimously that he committed the criminal act with which he was charged. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), modified by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); Const. art. 1, § 22; U.S. Const. amend. 6.

The decision of the Court of Appeals in finding the jury instructions acceptable was thus in conflict with State v. Mills, 154 Wn.2d 1, 7-9, 109 P.3d 415 (2005), and the many other cases holding that the "to convict" instruction must be the yardstick given to the jury to measure guilt or innocence. Since the "to convict" instruction purports to be a complete statement of what the state must prove for conviction, it must itself contain every element without a need to search for additional elements.

Further, the jury instruction, which was supposed to require unanimity, simply told the jurors, in its plain terms, that because the jurors had heard allegations of multiple acts, "to convict the defendant, one or more particular acts must be proven beyond a reasonable doubt and that you must unanimously agree as to which act or acts have been proven beyond a reasonable doubt." CP 116. The instruction then informed the jurors that they need not agree that all acts had been proven. CP 116.

This instruction permitting the jury "to convict" if they agreed on one act, compounded the problem of the lack of a proper "to convict" instruction and certainly did not cure it. What was missing was any requirement, in any of the instructions, that the jury unanimously agree, **for each count**, that a particular act had been proven. The issue is constitutional and the decision of the Court of Appeals is in conflict with other reported decisions. Review should be granted.

**2. THE USE OF THE ER 404(B) EVIDENCE IN THIS CASE WAS SO EXTENSIVE IT DENIED MR. FISHER A FAIR TRIAL; THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH OTHER DECISIONS AND THE ISSUE IS ONE OF SUBSTANTIAL PUBLIC IMPORTANCE.**

It is a fundamental premise underlying ER 404(b) that evidence of prior bad acts is never admissible to show that a defendant is acting in conformity with his character in committing the charged crime or that he had a propensity to commit the crime. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); ER 404(b).

The rules, as set out in State v. Salterelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982), for when prior bad acts may be admitted, are clear and well-established. Before evidence may be admitted, the court must identify the purpose for the evidence; the court must find that the purpose is relevant to prove an essential element of the crime and of consequence to the particular action; and the court must find that the probative value of the evidence outweighs its prejudicial impact. Salterelli. 98 Wn.2d at 361-62. The decision of the Court of Appeals is in conflict with Lough and Salterelli and other decisions interpreting ER 404(b).

Here, Ms. Lincoln testified that she delayed reporting because she was afraid of Mr. Fisher, an explanation which did not need further elaboration. It remains unclear why physical abuse to her siblings made her less willing to disclose. In any event, Ms. Lincoln **did** report physical abuse years before she reported sexual abuse, establishing that she was not afraid to report allegations of abuse against Mr. Fisher.

Most importantly, the court did nothing to limit the amount or type of prior bad acts evidence. As a result, the prior bad acts evidence overwhelmed the relevant evidence at trial. By closing argument, the prosecutor was listing the prior bad acts for the jurors and arguing that they provided proof of the charged crimes.

Further, the trial court did nothing to limit the prior bad acts to bad acts Ms. Lincoln might have had some reason to know of. The Court of Appeals excused this by trial counsel's failure to object. Slip op. at 6. Salterelli, however, requires the proponent of the evidence to establish its admissibility outside the presence of the jury and for the court to balance the relevance of the evidence prior to admission.

The trial court erred in admitting the ER 404(b) evidence of prior bad acts against Ms. Lincoln's siblings, erred in placing no limitations on the evidence to minimize its impact, and in permitting the prosecutor to go beyond the prior bad acts considered at the pretrial hearing. The decision of the Court of Appeals excusing the errors is in conflict with the reported ER 404(b) decisions and the plain language of the rule. The issue is one of substantial public importance which should be decided by this Court.

Review should be granted. It is fundamentally unfair to convict an accused person through a wholesale assault on his character.

### 3. THE PROSECUTOR'S MISCONDUCT DENIED MR. FISHER A FAIR TRIAL; THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH OTHER DECISIONS AND THE ISSUE IS ONE OF SUBSTANTIAL PUBLIC IMPORTANCE.

The prosecutor committed widespread misconduct, from making faces and gestures while the defendant was testifying and his attorney was arguing, to asking Mr. Fisher if he would have to register as a sex offender if he were convicted. This misconduct not only denied Mr. Fisher a fair trial, but it also demeaned the decorum of the courtroom and both the trial court and the Court of Appeals erred in excusing the behavior--and in placing the sole responsibility on trial counsel for policing the conduct of the prosecutor. In fact, much of the misconduct took place behind the back of defense counsel, but in direct view of the jury.

The prosecutor's conduct in arguing propensity and that Mr. Fisher was guilty of sexual misconduct because it was consistent with his character of physically abusing children was flagrant and ill-intentioned. The decision of the Court of Appeals excusing his misconduct is in conflict with State v. Allen Eugene Gregory, ____ Wn.2d ____, 147 P.3d 1202 (2006). Gregory, holds that "the fact that the state made the motion in limine and then blatantly violated the resulting order strongly suggests that the argument was flagrant and ill-intentioned." 147 P.3d at ____. Here, as in Gregory, the prosecutor obtained permission to introduce the prior bad acts evidence for a limited purpose and then blatantly and thoroughly violated the order in a manner clearly excluded by the rule, in conflict with the very

argument he made for admission of the evidence for a limited purpose. Further, the prosecutor's misconduct in eliciting additional 404(b) evidence without seeking permission outside the presence of the jury and in arguing the forbidden inferences from the evidence was so flagrant and ill-intentioned that nothing short of a new trial can cure the error.

As held in Lough, supra, the prejudice in admitting ER 404(b) is always that the jury will misuse the evidence and convict because they believe the defendant is the type of person who should be convicted. Lough, 125 Wn.2d at 863. When, as here, the prosecutor -- the same prosecutor who mimed his disapproval and personal opinion about the defendant and defense counsel -- invited the jury to misuse the evidence, a new trial should be granted.

The fact that the prosecutor's theory of the case was that Mr. Fisher was the type of person to have committed the crime cannot cure the error as the Court of Appeals found. The prosecutor's theory was the improper theory that Mr. Fisher was guilty of the sexual abuse because he was acting consistently with the character established by the physical abuse.

> What's that consistent with? Is that consistent with the pattern of what took place in Judy's house some two or three years later? You better believe it is . . . . There can be no doubt that the defendant is abusive. It showed in the way the defendant deals with and has dealt with the children all his life.

Slip op. at 20-21.

In addition, the prosecutor committed the well-established misconduct of misstating the burden of proof, impugning the integrity of defense counsel, eliciting information about the sentencing consequences of

conviction through questions which provided those consequences, and questioning the defense investigator about work product decisions. RP 174, 178, 180, 182-85, 196, 206-07, 209-11, 611, 661, 709, 711-12.

This is the type of misconduct that is so well-established that engaging it should be deemed flagrant and ill-intentioned and not excused. Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (the prosecutor may not launch unfounded attacks impugning the character of defense counsel); United States v. Frederick, 78 F.3d 1370 (9th Cir. 1996) (cumulative error including improper prosecutorial attacks on defense counsel required reversal); State v. Jury, 19 Wn. App. 256, 263-66, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978) (unfounded attempt to undermine defense case by denigrating defense counsel undermines right to effective assistance of counsel); State v. Swan, 114 Wn.2d 613, 769 P.2d 610 (1990) (improper for prosecutor to express personal opinions about credibility of witnesses or defense case); Court's Instruction No. 1 (instructing the jury that it had "nothing whatsoever to do with" sentencing consequences); State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996) (misconduct to argue to the jury that in order to convict the defendant, the jury would have to find that the state's witnesses were untruthful; such misconduct is so well-established that it is considered flagrant and ill-intentioned to make the argument).

The decision of the Court of Appeals is in conflict with this authority and with the decision in State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988), which holds that where there is a substantial likelihood that a prosecutor's misconduct affected the jury, the defendant

is deprived of the fair trial guaranteed by the Fourteenth Amendment.

Misconduct permeated the trial and, to a substantial likelihood, affected the jury. The Court of Appeals erred in excusing the misconduct. Review should be granted and Mr. Fisher's convictions reversed.

**4. THE DENIAL OF THE RIGHT TO CONFRONT WITNESSES AND PRESENT EVIDENCE TO ESTABLISH THEIR BIAS IS CONSTITUTIONAL ERROR. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH REPORTED DECISIONS AND THE ISSUE IS ONE OF SUBSTANTIAL PUBLIC IMPORTANCE.**

Mr. Fisher's defense at trial was that Ms. Ward had animosity and a bias against him because of their long and extremely bitter divorce and that the children were influenced by her. RP 23-24. He was prepared to cross-examine Ms. Ward to establish her motive and bias and to present the testimony that she threatened to "get" Mr. Fisher. RP 23-24.

The Court of Appeals excused the trial court's failure to allow Mr. Fisher to put on his defense by simply discounting it -- because the record did not show any on-going divorce proceedings. Slip op. at 31.

In holding that Mr. Fisher was not entitled to present his defense of choice, the Court of Appeals decision is in conflict with the Sixth Amendment and Const. art. 1 § 22, which guarantee a criminal defendant the right to present testimony and to confront and cross-examine witnesses. State v. Hudlow, 99 Wn. 2d 1, 14-15, 659 P.2d 514 (1983). These rights cannot be restricted, even by appellate courts' second-guessing trial strategy, absent a compelling state interest more important than the truth-finding process. Hudlow, 99 Wn.2d at 16; State v. Boast, 87 Wn.2d 447, 453, 553 P.2d 1322 (1976).

In denying Mr. Fisher the right to cross-examine witnesses to establish their bias, motive, or hostility, the trial court and the Court of Appeals denied Mr. Fisher his Sixth Amendment rights. State v. Buss, 76 Wn. App.780, 787, 887 P.2d 920 (1995). Such confrontation includes the right to place specific facts before the jury. State v. Brooks, 25 Wn. App. 550, 552, 611 P.2d 1274 (1980); State v. Pickens, 27 Wn. App. 97, 100, 615 P.2d 537 (1980); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

In any case involving allegations of misconduct, the question arises as to why a young woman would make accusations if they were not true. The defense is entitled to provide those reasons by showing specific grounds for bias, hostility and motive.

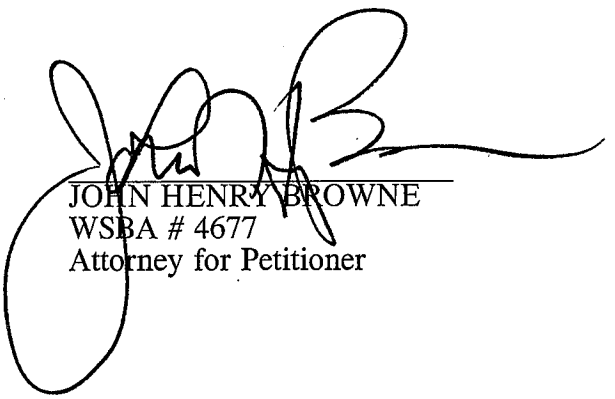
The prosecutor was able to take advantage of the exclusion of evidence and curtailment of cross-examination by eliciting from Ms. Lincoln that neither she nor her siblings had any lawsuits or reason to accuse Mr. Fisher. At the least, Mr. Fisher had the right to present evidence after this door was opened. The error was constitutional and the decision affirming the trial court in conflict with reported decisions. The issue is of substantial public importance; it goes to the heart of the defendant's trial rights. Review should be granted.

## F. CONCLUSION

Petitioner respectfully submits that review should be granted and his convictions reversed and remanded for retrial.

DATED this 5 day of February, 2007.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| **STATE OF WASHINGTON,** | ) | **No. 24253-6-III** |
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| **Respondent,** | ) | |
| | ) | |
| **v.** | ) | **Division Three** |
| | ) | |
| **TIMOTHY SCOTT FISHER,** | ) | |
| | ) | |
| **Appellant.** | ) | **UNPUBLISHED OPINION** |

**KATO, J.** — Timothy Scott Fisher appeals his convictions of four counts of second degree child molestation. He contends the court made several evidentiary errors; the prosecutor committed misconduct; a witness's testimony was an impermissible opinion on his guilt; he was denied his right to a unanimous verdict; and cumulative error requires reversal of his convictions. We affirm.

In 1997, Mr. Fisher married Judy Ward. They bought a home together and Ms. Ward's children, M.L., B.L and B.D., moved in with them. M.L. was between 10 and 11 years old. Two years later, Mr. Fisher and Ms. Ward divorced.

On March 20, 2003, one day after her 18th birthday, M.L. told her mother that Mr. Fisher had sexually molested her. M.L. said she wanted to press

charges. Ms. Ward called the police. Mr. Fisher was charged with one count of second degree child molestation. The information was later amended to charge him with four counts of second degree child molestation.

Prior to trial, the State sought to admit evidence under ER 404(b) that Mr. Fisher physically abused M.L., B.L., and B.D. The court admitted evidence of specific instances of abuse that M.L. saw or heard to explain her fear of Mr. Fisher and to explain her delay in reporting the sexual abuse.

At trial, M.L. testified that she did not report the abuse until after her 18th birthday because she was afraid of Mr. Fisher. M.L. said he began sexually abusing her when she was in the 7th grade. Mr. Fisher punished her by taking her upstairs. She said Mr. Fisher pulled down her pants and underwear and spanked her with his hand. A couple weeks later, he began asking her take her clothes off. She said Mr. Fisher made her open her legs while he looked in her vagina. He touched her vagina and plucked her pubic hair. He also grabbed her breasts and twisted them. M.L. said Mr. Fisher touched her daily and that it happened more than 10 times.

Mr. Fisher denied involvement in the crimes. He testified he never took

M.L. upstairs to punish her. He did not make M.L. take off her clothes and did not touch her in a sexual way.

The jury convicted Mr. Fisher as charged. This appeal follows.

Mr. Fisher contends the court abused its discretion when it permitted the State to introduce evidence of prior abuse under ER 404(b). We review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). "'A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.'" *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (quoting *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)), *review denied*, 133 Wn.2d 1019 (1997).

ER 404(b) provides in relevant part:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Admissibility under ER 404(b) requires that the court (1) find the evidence relevant and identify the purpose for which the evidence will be admitted, and (2)

conduct an ER 403 balancing test weighing the probative value of the evidence against any undue prejudicial effect the evidence may have upon the fact finder. *State v. Saltarelli*, 98 Wn.2d 358, 362-66, 655 P.2d 697 (1982). Evidence is relevant if it is of consequence to the outcome of the action and makes the existence of the identified fact more or less probable. *Id.* at 362-63.

When admitting ER 404(b) evidence, the court should conduct the weighing analysis on the record, but failure to do so is harmless if the record as a whole reflects that the court weighed the potential prejudice of the evidence against its probative value when deciding to admit the evidence. *See State v. Powell*, 126 Wn.2d 244, 264-65, 893 P.2d 615 (1995). Evidence is unduly prejudicial when it is likely to "arouse an emotional response rather than a rational decision among the jurors." *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994).

Mr. Fisher first claims the court erred by admitting evidence that he physically abused M.L., B.L., and B.D. He argues the evidence was prejudicial and the court failed to conduct the necessary balancing test on the record. But the court stated its reasons for admitting the evidence as being relevant to explaining M.L.'s delay in reporting the sexual abuse. Mr. Fisher, however,

claims the probative value of the evidence was outweighed by its inherent prejudice.

"When an alleged victim acts inconsistently with a disclosure of abuse, such as by failing to timely report the abuse or by recanting or minimizing the accusations, evidence of prior abuse is relevant and potentially admissible under ER 404(b) to illuminate the victim's state of mind at the time of the inconsistent act." *State v. Cook*, 131 Wn. App. 845, 851, 129 P.3d 834 (2006) (footnote omitted); *State v. Wilson*, 60 Wn. App. 887, 890-91, 808 P.2d 754, *review denied*, 117 Wn.2d 1010 (1991).

M.L. testified that she did not report the allegations of sexual abuse because she was afraid of Mr. Fisher. Evidence that he physically abused M.L. and her siblings was relevant and probative to explain her fear of him.

Moreover, in its ER 404(b) ruling, the court acknowledged the prejudicial nature of the evidence:

> The purpose of the evidence will be to explain the delay in reporting. My earlier questions and answers from counsel it seemed clear that the delay of reporting will come up in the trial and be a major issue. So I will go to the [fourth] point and that is weighing the probative value versus unfair prejudice. Evidence is very probative but certainly it would be unfairly prejudicial if the delay in reporting was not made an issue but if the delay in reporting is made an issue,

> which I understand it will be, I believe the probative value outweighs the prejudicial effect and there [definitely] should be a limiting instruction.

Report of Proceedings (June 8, 2004) at 190. The court did not abuse its discretion by admitting the evidence.

Mr. Fisher also argues the court erred by admitting evidence that he physically abused his children T.F. and W.F. During trial, the State called Jennifer Dick, Mr. Fisher's ex-wife, to testify. Ms. Dick said that in 1993, Mr. Fisher had "smacked" T.F. across his face and the police were called. Clerk's Papers (CP) at 610-11. When the police asked her whether there had been other incidents of abuse, she told them Mr. Fisher had also kicked T.F. Ms. Dick told the police she had concerns about leaving her children with him. Mr. Fisher did not object to Ms. Dick's testimony. His failure to object, therefore, waives the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

Mr. Fisher next contends the court erred by not giving the jury a limiting instruction when it admitted the ER 404(b) evidence. But he did not ask for a limiting instruction. When the defendant fails to offer a proper limiting instruction,

we will not consider whether the court erred by failing to give one. *State v. Donald*, 68 Wn. App. 543, 547, 844 P.2d 447, *review denied*, 121 Wn.2d 1024 (1993).

Mr. Fisher contends the court erred by admitting a Department of Social and Health Services (DSHS) report. The report stated that his current wife, Peggy Fisher, had filed a complaint against him alleging that he physically abused his stepdaughters A. and S. He argues the reports were not authenticated by the custodian of records or other qualified witness and the underlying accusations in the report were hearsay within hearsay. But there is nothing in the record to indicate that this report was even admitted into evidence. Moreover, it is unclear from the record whether the State's questions to Mr. Fisher about a DSHS report even related to A. and S. We are therefore unable to address the issue on appeal. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Mr. Fisher next contends the court erred by concluding that his and Ms. Fisher's testimony "opened the door" to evidence of the prior physical abuse. During trial, defense counsel questioned Ms. Fisher on direct examination about

whether she had ever observed Mr. Fisher disciplining her daughters. Defense counsel also asked Ms. Fisher whether she was comfortable leaving her children alone with him. On cross examination, the State questioned Ms. Fisher as to whether she was aware of the allegations that Mr. Fisher physically abused M.L., B.L., B.D., and T.F. The State then asked Ms. Fisher if she still believed it was safe to have him around her children.

The defense later called Mr. Fisher to testify. On direct examination, defense counsel inquired into Mr. Fisher's methods of disciplining M.L., B.L., and B.D. Defense counsel also asked him about specific instances of physical abuse to M.L., B.L, and T.F. On cross examination, the State questioned Mr. Fisher about these allegations of physical abuse.

It is a sound general rule that, when a party opens up a subject of inquiry on direct or cross examination, he contemplates that the rules will permit cross examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). The rules of evidence do not supersede this "open door" doctrine. *State v. Brush*, 32 Wn. App. 445, 451, 648 P.2d 897

(1982), *review denied*, 98 Wn.2d 1017 (1983).

Here, defense counsel elicited testimony about Mr. Fisher disciplining his children and stepchildren. Defense counsel also elicited testimony about specific instances of prior physical abuse. Counsel thus "opened the door" to questioning on cross examination concerning the physical abuse. The court did not abuse its discretion by ruling the evidence was admissible.

Mr. Fisher contends the court erred by admitting evidence about his gastric bypass surgery and his inability to have sex. On cross examination, the State questioned him about his reasons for having gastric bypass surgery. Mr. Fisher testified he had the surgery because he was overweight. The State then asked him about his sexual relationship with his ex-wife, Judy Ward. He testified his sexual relationship with her was "consistent" and "[g]ood as an ice cream cone." CP at 742. Defense counsel objected on relevancy grounds. He argued that the frequency of sexual activity between Mr. Fisher and Ms. Ward was irrelevant and prejudicial. The State argued the testimony was relevant to prove the sexual contact element of the crime charged. The court found the State's questions to be general in nature and allowed questioning to continue. Mr. Fisher then said he

and Ms. Ward had sex on average of three or four times a week.

To rebut Mr. Fisher's testimony, the State called Ms. Ward to testify. The following exchange occurred:

> [Prosecutor]: . . . You heard the testimony of the defendant that you and he were having sexual intercourse during 1997, two, three, four times a week[.] Do you remember that testimony?
> [Ms. Ward]: Correct.
> [Prosecutor]: During 1997, were you having sexual relations with the defendant that frequently?
> [Ms. Ward]: No.
> [Prosecutor]: Were there physical limitations that prevented you from having sexual intercourse with the defendant that many times a week?
> [Ms. Ward]: Yes.

CP at 784-85.

Mr. Fisher argues his medical decisions and sexual relationship with Ms. Ward were irrelevant. He claims the testimony should have been excluded under ER 402 and ER 403.

To be admissible, evidence must be relevant. ER 402. Evidence is relevant when it has any tendency to make the existence of any fact more or less probable, provided other rules do not preclude its admission. ER 401; ER 402. "Even a minimal logical relevancy is adequate if there exists a reasonable

connection between the evidence and the relevant issues." *State v. Suarez-Bravo*, 72 Wn. App. 359, 364, 864 P.2d 426 (1994). Although relevant, evidence may still be excluded if its probative value is outweighed by the danger of unfair prejudice. ER 403. Evidence is unfairly prejudicial when it tends to encourage a decision on an improper basis, such as an emotional one. *State v. Stackhouse*, 90 Wn. App. 344, 356, 957 P.2d 218, *review denied*, 136 Wn.2d 1002 (1998). We review the trial court's admission of evidence for an abuse of discretion. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022 (1993).

The State was required to prove "sexual contact" in order to convict Mr. Fisher of second degree child molestation. RCW 9A.44.086. "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." RCW 9A.44.010(2). Testimony as to the circumstances of Mr. Fisher's sexual relationship with Ms. Ward was probative of and material to this element of the crime.

The State's questions, however, concerning Mr. Fisher's gastric bypass surgery appear irrelevant to prove this element of the crime. But defense counsel

did not object to this line of questioning. The only objection concerned Mr. Fisher's sexual relationship with Ms. Ward. A party cannot appeal absent a timely and specific objection to the admission of that evidence. ER 103; *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), *review denied*, 129 Wn.2d 1007 (1996). We need not consider Mr. Fisher's claim that the court erred by admitting this testimony. RAP 2.5(a).

Mr. Fisher also argues the court erred by allowing Ms. Ward to testify that he was "too fat for sex." Br. of Appellant at 29. But this testimony was elicited by defense counsel, not the State:

> [Defense counsel]: You talked about physical limitations. Were those his or yours?
> [Ms. Ward]: His.
> [Defense counsel]: What are those?
> [Ms. Ward]: His weight.
> [Defense counsel]: In other words, he was too fat to have sex with?
> [Prosecutor]: Objection, Your Honor, to the form of that question. I think it's very argumentative and offensive.
> [The Court]: Perhaps you could rephrase it.
> [Defense counsel]: What about his weight limited your ability to have sex?
> [Ms. Ward]: It was very uncomfortable to have sex because of that.

CP at 787-88. Defense counsel elicited the testimony that Mr. Fisher now

complains of on appeal. He cannot set up error at trial and then complain of it on appeal. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). Accordingly, we will not review this alleged error.

Mr. Fisher next contends the prosecutor committed misconduct in several instances. To obtain reversal of a conviction on the basis of prosecutorial misconduct, a defendant must show the prosecutor's conduct was improper and the conduct had a prejudicial effect, which means there must be a substantial likelihood the conduct affected the verdict. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). Absent an objection, a defendant cannot claim prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that a curative instruction could not have neutralized any prejudice. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Mr. Fisher first argues the prosecutor committed misconduct when (1) the

prosecutor made gestures during defense counsel's opening and closing statements; (2) the prosecutor improperly questioned defense investigator, Marlene Goodman; and (3) the prosecutor improperly cross-examined Mr. Fisher.

The State called Ms. Goodman to testify about the defense's interview of M.L. Ms. Goodman was present at the interview. The following exchange occurred between the prosecutor and Ms. Goodman:

> [Prosecutor]: Did [defense counsel] ask her about sexual abuse?
> [Ms. Goodman]: No, he did not.
> [Prosecutor]: Not one question about sexual abuse?
> [Ms. Goodman]: Let me make sure. (Witness checks notes). She did not talk about sexual abuse, the specific sexual abuse.
> [Prosecutor]: Okay. Well, that's an answer to a question, but that's not the answer to my question.
> Did [M.L.] talk to Mr. Klein about being sexually abused? I don't care if it's specific or not specific, I want to know if she talked about it?
> [Ms. Goodman]: No, she didn't.
> [Prosecutor]: Was she asked about it?
> [Ms. Goodman]: No, she was not. She was asked who she told.
> [Prosecutor]: Okay. It was your understanding, at the time of this interview, that the defendant was being charged with child molestation, is that right?
> [Ms. Goodman]: That's correct.
> [Prosecutor]: And as a former police officer, a former employee of a Prosecutor's office, if you're interviewing the victim of a specific crime, do you normally ask about the crime?
> [Ms. Goodman]: Mr. Johnson, I told you I was not the one

conducting the interview. I was there to take notes.

[Prosecutor]: I think we all understand that. And I'm just asking you, based upon your training and experience –

[Defense Counsel]: Objection, Judge. This goes into what I choose to interview about, what I think was important at the time. It's ridiculous.

[Court]: I'll sustain the objection.

CP at 356-57.

Then, during the State's cross examination of Mr. Fisher, the following exchange occurred:

[Prosecutor]: Let me ask you a couple questions. Have you rehearsed your testimony here today?

[Mr. Fisher] Have I rehearsed it?

[Prosecutor]: Yes.

[Mr. Fisher]: I have talked to my counsel.

[Prosecutor]: What about Miss Goodman?

[Mr. Fisher]: I may have talked to Miss Goodman.

[Prosecutor]: And have they told you how to answer questions that I ask you?

[Mr. Fisher]: No.

[Prosecutor]: Have they practiced asking you questions that I've asked you?

[Mr. Fisher]: Yes.

[Prosecutor]: They have?

[Mr. Fisher]: They've practiced asking me questions, but I won't say that they were directly the questions that you're asking me.

[Prosecutor]: And did they practice with you refining the answers to questions that I might ask you?

[Mr. Fisher]: No.

[Prosecutor]: No? So they would just ask you questions and you would give answers that would be it?

> [Mr. Fisher]: Yes.
> [Prosecutor]: Was the purpose of that to gauge your reaction to questions?
> [Mr. Fisher]: I don't know what the purpose of that was.
> [Prosecutor]: You have no idea why you went through a practice run of what I might be asking you?
> [Defense counsel]: Objection. He is asking what he talked about with his lawyer.
> [Prosecutor]: Your Honor, I'm asking about rehearsed testimony.
> [Defense counsel]: Between him and his lawyer.
> [Prosecutor]: The answers he is giving are pat answers and we need to get to the bottom on why.

CP at 736-38. The court sustained defense counsel's objection. The prosecutor continued questioning Mr. Fisher.

> [Prosecutor]: There were numerous opportunities for you to be alone with [M.L.] in her room. Yes or no?
> [Mr. Fisher]: No.
> [Prosecutor]: There were not?
> [Mr. Fisher]: Numerous? No.
> [Prosecutor]: Were there opportunities – and you've been coached well –
> [Defense counsel]: Objection, Judge.
> [The Court]: Sustained.
> [Defense Counsel]: He has not been coach[e]d and that is not a fair inference.
> [The Court]: Sustained. No comments, just questions.

CP at 738-39. During defense counsel's opening and closing arguments, several witnesses also claimed that they saw the prosecutor "wincing, rolling his eyes,

and shaking his head in a negative manner" and "striking his forehead with the palm of his hand as if amazed at [defense counsel's] statements, throwing his hands out to the sides in disbelief and shrugging and posturing." CP at 77-80.

Mr. Fisher contends the prosecutor's questions, remarks, and gestures constituted misconduct because they impugned defense counsel. A prosecutor should refrain from personally attacking defense counsel, impugning the character of the defendant's lawyer, or disparaging defense lawyers in general as a means of imputing guilt to the defendant. *See State v. Reed*, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984); *United States v. McDonald*, 620 F.2d 559, 564 (5th Cir. 1980). Comments that permit the jury "to nurture suspicions about defense counsel's integrity" can deny a defendant's right to effective representation. *State v. Neslund*, 50 Wn. App. 531, 562, 749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988).

The defendant bears the burden of demonstrating that the prosecutor's comments were improper and their effect was prejudicial. *Brown*, 132 Wn.2d at 561. "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *State v. Russell*, 125 Wn.2d 24,

85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

Here, while the prosecutor's questions, remarks, and gestures were unwarranted, they did not rise to the level of reversible misconduct. The court also sustained defense objections to the challenged comments. These rulings sufficiently ameliorated the effect of the prosecutor's statements on the jury. Moreover, defense counsel did not request any additional curative instructions. Reversal on this basis is not required.

Mr. Fisher next argues the prosecutor committed misconduct when he asked about the sentencing consequences of a conviction. During the State's cross examination of Mr. Fisher, the following exchange occurred:

> [Prosecutor]: You're aware that, if convicted, you would have to register as a sex offender?
> [Mr. Fisher]: I've been told that.
> [Prosecutor]: You also know, from your previous experience with the no contact order, that there would be no contact with your stepchildren as a likely result, correct?
> [Mr. Fisher]: With my –
> [Prosecutor]: With your step children, as a likely result of being convicted?
> [Mr. Fisher]: My current stepchildren?
> [Prosecutor]: Your current stepchildren.
> [Mr. Fisher]: Nobody has told me that.
> [Prosecutor]: You're unaware of that?
> [Mr. Fisher]: Yes.

CP at 763.

Mr. Fisher claims that eliciting this testimony constituted misconduct because the jury was prohibited from considering such testimony pursuant to the court's instructions. But Mr. Fisher did not object at trial to the prosecutor's questions. He must therefore show they were so flagrant and ill intentioned that they could not be cured by a jury instruction.

Although it is unclear what the prosecutor was attempting to accomplish with this line of questioning, the jury could infer from the nature and numerous charges against him, Mr. Fisher faced serious consequences. Moreover, the court gave the jury the following instruction: "You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful." CP at 111. Juries are presumed to follow the court's instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). The prosecutor's questions, though improper, were not so flagrant and ill intentioned to require reversal.

Mr. Fisher also argues the prosecutor committed misconduct in two

instances during closing argument. A prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence in closing argument. *Hoffman*, 116 Wn.2d at 94-95. When the prosecutor does no more than argue facts in evidence or suggest reasonable inferences from the evidence, there is no misconduct. *See State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985).

Mr. Fisher first argues the following statements during closing arguments constituted misconduct:

> I want to start at the fact that I told you that you get to meet two Timothy Fishers. You get to meet the one Timothy Fisher who behaved in public as if he were a model citizen. The Timothy Fisher that people not within his scope of influence would know. The Timothy Fisher that would not be physically abusive to children. The Timothy Fisher that would not sexually abuse people.
>
> . . . .
>
> . . . When the defendant was questioned by me, you got to meet the other Timothy Fisher. The Timothy Fisher who operated behind closed doors. The Timothy Fisher who that engaged in repeated abuse of children, culminating in the sexual abuse of [M.L.].

CP at 806.

> We also know, from listening to Jennifer, that the defendant continued to abuse [T.F.]. And that she wouldn't even – wasn't even comfortable leaving the kids with the defendant because of that abuse. Because when the defendant had them, he abused them.
>
> What's that consistent with? Is that consistent with the pattern

> that took place in Judy's house some two or three years later? You better believe it is. When the defendant was alone with the children, what happened? The children were abused. And it follows that distinct pattern that the defendant started with his own son.

CP at 813.

> [T.F.] does start to show the disturbing trend in the case and that's of a system-wide failure with the defendant. The defendant was held accountable, sort of, by the Pasco Municipal Court when he was ordered to have anger management. But reports kept coming in about the defendant being abusive. Reports from a school counselor. [Child Protective Service] gets the report, nothing much happens. The defendant is abusive in the Pasco case, gets a little anger management and that's it.
>
> There is a system-wide failure going on here, ladies and gentlemen, and we'll talk more about it as we go – but that system-wide failure stops in the courtroom. Because the system now, or soon, is gonna be the twelve of you who are going to decide this case. And the failure of this system, the horrible failure of this system stops with the defendant's conviction of molesting [M.L.]. But it starts here with [T.F.].

CP at 815-16.

The prosecutor then discussed the physical abuse allegations of various witnesses at trial, including Mr. Fisher's children and stepchildren. He stated:

> The truth of this case is that the system has failed. The system has failed [T.F.]. The system has failed [M.L.]. The system has failed [B.L.]. The system has failed [B.D.]. And the system has failed [A.] and [S.]. It's failed all of them sitting out there. And there is only one way that we can make sure that the system stops failing and that's to do the job that you all have been charged with and that I

know you'll do.

CP at 831-32. In rebuttal, the prosecutor stated:

> There can be no doubt that the defendant is abusive. It shows in the way the defendant deals with and has dealt with children in his life. Children are objects to be abused. Had there been one instance of the defendant being abusive, that wouldn't be a very good argument. Had he been abusive once to [T.F.], once to [B.L.], no. It's not once, it's thirteen separate instances, ladies and gentlemen. Thirteen separate instances, including [M.L.] and including the sexual abuse.

CP at 863.

Mr. Fisher claims that in making these statements, the prosecutor improperly used ER 404(b) testimony to argue propensity. But these statements were made in the context of the prosecutor discussing the State's theory of the case. They reiterated the evidence or constituted reasonable inferences from it. Moreover, the court instructed the jury that "[t]he attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court." CP at 111. Juries are presumed to follow the court's instructions. *Johnson*, 124 Wn.2d at 77.

Mr. Fisher also argues the prosecutor's misstatement of the burden of proof

during closing arguments constituted misconduct. Mr. Fisher assigns error to the following statements:

> You also got to see [M.L.] on the stand. And there weren't two faces to [M.L.]. There was one [M.L.]. And she told you about what the defendant did to her. She told you with honesty and with sincerity. And you got to evaluate her credibility when she was up here. How was her testimony, including direct examination and cross-examination, different from the defendant's? Was she putting on a show and then changing that show for the purposes of you all? No. She came up here and she told you the truth. And when you balance that against what you saw with the defendant, the balance tips heavily – heavily towards the irrefutable truth that [M.L.] is telling you the truth. That she is telling you what the defendant did to her.

CP at 807.

In rebuttal, the prosecutor argued:

> And yes, it really does come down in the end to whose credibility you believe. Do you believe [M.L.'s]? Or, do you believe the defendant's? There is a lot of evidence backing [M.L.'s] credibility. But do you notice one area that the defense never talked about during the closing? His client. You never heard him talk about his client. You never heard him talk about how his client appeared on the stand. You never heard him talk about his client's answers. You never heard him talk about his client's demeanor.

CP at 870-71.

A prosecutor commits flagrant misconduct by arguing that to acquit a defendant, the jury must find that the State's witnesses are either lying or

mistaken, because such an argument misstates the law and misrepresents both the role of the jury and the burden of proof. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997). But a prosecutor may properly draw inferences "from the evidence . . . as to why the jury would want to believe one witness over another." *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). "[W]here a jury must necessarily resolve a conflict in witness testimony to reach a verdict, a prosecutor may properly argue that, in order to believe a defendant, the jury must find that the State's witnesses are mistaken." *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995) (emphasis omitted).

Here, the prosecutor's argument asked the jury to evaluate the credibility of M.L. and Mr. Fisher based on their testimony at trial. To the extent the argument focused on assessing the credibility of witnesses who offered directly conflicting testimony, it was proper. However, by stating, "And when you balance that against what you saw with the defendant, the balance tips heavily – heavily towards the irrefutable truth that [M.L.] is telling you the truth," the prosecutor approached the limits of acceptable argument and created the potential for

misleading the jury. CP at 807.

But the defense did not object and Mr. Fisher thus waived any error unless the remark was so flagrant and ill intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Russell*, 125 Wn.2d at 86. The prosecutor did not misstate the law, the burden of proof, or the jury's duty to assess the credibility of the witnesses. Any prejudice caused by the potentially misleading nature of this statement thus could have been addressed by an instruction to the jury following an objection. Mr. Fisher's failure to object therefore constitutes a waiver of the claimed error.

Mr. Fisher next contends the court erred by admitting Ms. Goodman's testimony. During trial, the defense cross-examined M.L. about a telephone interview with defense counsel, who specifically asked her whether she said "I lied to Officer Manthey" during the interview. CP at 253. The State later called Ms. Goodman to testify. She was present during the defense's interview with M.L. The State asked Ms. Goodman questions concerning M.L.'s statements during the defense interview, as well as whether M.L.'s testimony at trial was consistent with her statements during the interview.

Mr. Fisher first argues it was error for the State to call Ms. Goodman to confirm whether M.L.'s statements at trial were consistent with her statements during the defense interview. Mr. Fisher cites ER 801(d)(1)(ii).

ER 801(d)(1)(ii) states in pertinent part:

> A statement is not hearsay if –
> (1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

M.L. testified before Ms. Goodman took the stand. During cross examination, defense counsel asked M.L. questions designed to show that she fabricated her story. Ms. Goodman's testimony was used to show M.L.'s prior consistent statements to rebut any allegation of fabrication. Such testimony was admissible. The court did not err by admitting Ms. Goodman's testimony.

Mr. Fisher next argues the court erred by allowing the State to ask Ms. Goodman questions about information protected by the work product doctrine. During Ms. Goodman's testimony, the State asked her about the number of hours she worked on the case and whether she had interviewed any other witnesses.

The State also asked Ms. Goodman whether defense counsel's failure to ask M.L. about the sexual abuse was appropriate based upon her training and experience. Defense counsel objected. The court sustained the objection.

"The work-product doctrine protects from discovery an attorney's work product, so that attorneys can 'work with a certain degree of privacy and plan strategy without undue interference.'" *State v. Pawlyk*, 115 Wn.2d 457, 475, 800 P.2d 338 (1990) (quoting *Coburn v. Seda*, 101 Wn.2d 270, 274, 677 P.2d 173 (1984)). The doctrine applies to the "research, . . . records, correspondence, reports or memoranda, to the extent that they contain the opinions, theories or conclusions, of investigating or prosecuting agencies." CrR 4.7(f)(1); *Pawlyk*, 115 Wn.2d at 477.

Here, the prosecutor's questions, although irrelevant, did not involve the defense's "opinions, theories or conclusions" of the case. *Pawlyk*, 115 Wn.2d at 477 (quoting CrR 4.7(f)(1)). They did not constitute protected work product. The court did not err by allowing Ms. Goodman to testify.

Mr. Fisher contends the court erred by allowing M.L., B.L., and B.D.'s therapist, Bonnie Kendall, to testify. During trial, the prosecutor asked Ms.

Kendall to relay her impressions of the children. Ms. Kendall testified that while treating M.L., she noticed that M.L. expressed concern for her family. She said M.L. came to her for help on how to help her family and that she was not concerned with her own distress. Ms. Kendall said B.L. was excessively worried about his family and his family's safety. She said B.L. had intense feelings of guilt and remorse, but was able to make some headway in his treatment when he was able to apologize to M.L. for not protecting her enough. Mr. Fisher argues this testimony was an impermissible opinion as to his guilt because the assumption underlying Ms. Kendall's testimony was that the children had been abused.

No witness may express an opinion as to the guilt of a defendant, whether by direct statement or inference. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such an opinion violates the defendant's right to a trial by an impartial jury and his right to have the jury make an independent evaluation of the facts. *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), *overruled in part on other grounds by City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994).

Testimony that is deemed to be an improper opinion on guilt usually involves an assertion pertaining directly to the defendant. *Heatley*, 70 Wn. App. at 577. The determination as to whether testimony is an impermissible opinion on guilt or a permissible opinion pertaining to an ultimate issue requires the consideration of the particular circumstances of the case, the type of witness called, the nature of the testimony and the charges, defenses invoked, and the other evidence presented to the trier of fact. *Id.* at 579.

Ms. Kendall did not testify as to whether the children had been abused. She testified about her impressions of the children during the treatment sessions, which focused on their feelings of concern for their family. Ms. Kendall's comments also did not involve an assertion pertaining directly to Mr. Fisher. Her testimony did not constitute an improper opinion on Mr. Fisher's guilt. The court did not err by admitting Ms. Kendall's testimony.

Mr. Fisher next contends the court erred by prohibiting testimony on the financial matters of his divorce with Ms. Ward. Prior to Ms. Ward's testimony, defense counsel asserted that Ms. Ward had refused to comply with a judgment awarding Mr. Fisher half the equity in their home and that it took Mr. Fisher three

years to obtain the money. Defense counsel said Ms. Ward had even tried to file for bankruptcy to avoid paying Mr. Fisher. Defense counsel informed the court that Ms. Ward had a motive or bias against Mr. Fisher and had told a colleague that she would "get Mr. Fisher any way she could." CP at 480. Defense counsel requested that such testimony be allowed.

The court allowed the defense to cross-examine Ms. Ward about the length of the divorce proceedings and her dislike for Mr. Fisher. The court, however, prohibited defense counsel from cross-examining Ms. Ward on the financial matters of the divorce and Ms. Ward's statements to her colleague. The court found that when M.L. made her allegations in 2003, the divorce proceedings had already been completed. The court also found that such testimony would not be admitted, because "[t]he real person who [is] making these allegations is [M.L.]." CP at 481. Mr. Fisher argues the court erred by prohibiting him from cross-examining Ms. Ward on these issues to establish her motive or bias against him.

A criminal defendant has the right to present a defense and to confront and cross-examine witnesses. U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend. 10). A defendant may cross-examine the State's witnesses to show

bias, motive or lack of credibility, but he may not bring in irrelevant evidence. *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). "Bias can arise from a variety of circumstances, including civil proceedings between the victim and the defendant." *State v. Dolan*, 118 Wn. App. 323, 327, 73 P.3d 1011 (2003). "Bias includes that which exists at the time of trial, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness's accuracy while the witness was testifying." *Id.* (emphasis omitted). Generally, the trial court has broad discretion to admit or exclude evidence. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

Mr. Fisher sought to introduce evidence of the financial matters of his divorce with Ms. Ward and her statements to a colleague. But the divorce was finalized in 1999. There is nothing in the record to show that any issues relating to the divorce were still being litigated at the time M.L. reported her allegations in 2003. The trial court allowed the defense to cross-examine Ms. Ward generally about the divorce proceedings and her dislike of Mr. Fisher. This was sufficient. The court did not abuse its discretion by limiting Ms. Ward's testimony.

Mr. Fisher contends he was denied his right to a unanimous verdict when the court improperly instructed the jury. He argues the court did not give separate "to convict" instructions for the four charges and the instructions did not require the jury to find either unanimity or proof beyond a reasonable doubt for each conviction. After closing arguments, the court instructed the jury:

> To convict the defendant of the crime of child molestation in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on four separate days between January 1, 1997 and December 30, 1997, the defendant had sexual contact with [M.L.];
>
> (2) That [M.L.] was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
>
> (3) That the defendant was at least thirty-six months older than [M.L.]; and
>
> (4) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 118. The court also gave the jury the following unanimity instruction:

> There are allegations that the defendant committed acts of Child Molestation on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously

agree that all the acts have been proved beyond a reasonable doubt.

CP at 116. Mr. Fisher did not object to these instructions at trial and failed to propose any instructions of his own.

"In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed." *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). "When the prosecutor presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act." *Kitchen*, 110 Wn.2d at 409 (citing *Petrich*, 101 Wn.2d at 570)).

> [I]n multiple act cases, when the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.

*Id.* at 405-06. Since Mr. Fisher's claimed error is of constitutional magnitude, it

may be raised for the first time on appeal. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Jury instructions must be read as a whole and each instruction must be viewed in context. *Brown*, 132 Wn.2d at 605. Jury instructions are sufficient if they permit the parties to argue their theories of the case, do not mislead the jury and, when read as a whole, correctly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

Mr. Fisher was charged with four counts of second degree child molestation. The "to convict" instruction specified that in order to convict Mr. Fisher, the jury had to find that Mr. Fisher committed the crime on four separate days. The jury was given four verdict forms to correspond with the four charges. Both the "to convict" and unanimity instructions properly informed the jury that (1) the State alleged Mr. Fisher had committed multiple acts of molestation with M.L., (2) that one or more particular acts of the crime had to be proved beyond a reasonable doubt, (3) that the jury had to unanimously agree as to which act or acts had been proved beyond a reasonable doubt, and (4) that the jury was not required to unanimously agree that all alleged acts had been proved beyond a

reasonable doubt.

Viewed in its entirety and in conjunction with the other instructions, the court's "to convict" and unanimity instruction required the jurors to agree unanimously that at least one particular act of sexual molestation had been proved beyond a reasonable doubt as to each count charged. The jury instructions did not violate Mr. Fisher's right to a unanimous jury verdict.

Mr. Fisher also contends the doctrine of cumulative error requires reversal. Under this doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a fundamentally unfair trial. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). But when no prejudicial error is shown, cumulative error could not have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990).

Mr. Fisher fails to identify any prejudicial error occurred here. The cumulative error doctrine is therefore inapplicable.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kato, J.

WE CONCUR:

Brown, J.

Kulik, J.